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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DION KOMAINE MCCORMICK, Defendant and Appellant.	F075465 (Super. Ct. No. VCF305503) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Matthew J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon, Peter W. Thompson, and Rachelle Newcomb, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Franson, J. and Snauffer, J.

Dion Komaine McCormick[1] (defendant) stands convicted, following a jury trial, of second degree robbery (Pen. Code,[2] § 211; count 1) and attempted second degree robbery (§§ 211, 664; count 2), in the commission of each of which he personally used a firearm (§ 12022.53, subd. (b)). He was sentenced to a total term of 13 years in prison, and ordered to pay various fees, fines, and assessments. He now appeals, claiming (1) his convictions must be reversed due to ineffective assistance of counsel, and (2) the matter must be remanded to afford the trial court the opportunity to exercise its discretion to strike the firearm enhancements. Because we agree with the first contention, we do not reach the second one.

FACTS

At around 2:00 a.m. on June 8, 2014, M.D. and C.G. were walking from a Visalia restaurant to M.D.'s car, which was parked at another establishment. A black SUV passed them as they entered an alley. As they came out the other side, defendant approached them. He walked a step past them, looked around, came back, pulled a gun from his waistband, "racked it" but kept it pointed at the ground, and said, "Give me everything." M.D. handed him all the money he had, approximately $300. C.G. put his cell phone on the ground, but defendant did not take it. When M.D. and C.G. left the alley, M.D. saw defendant get into the back driver's side seat of the SUV, which drove off. C.G. called the police.

On the night of August 29, 2014, M.D. received a call from C.G., who said he saw the person who robbed them at Visalia Brewing Company. M.D. waved down a police officer and explained what had happened. The officer took M.D. to the scene, where M.D. recognized the robber and pointed him out. Visalia Police Officer Somavia made

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1 Portions of the record, including the verdicts and abstract of judgment, show defendant's surname as "McCormick." As confirmed at oral argument, his true name is "McCommick."

2 All statutory references are to the Penal Code unless otherwise stated.

contact with C.G., who identified defendant as the robber. M.D. subsequently made an identification from a photographic lineup.

Detective Pena interviewed defendant that night. Defendant initially denied committing the robbery, but eventually confessed.

DISCUSSION

Defendant contends his trial attorney's performance was prejudicially deficient, in that counsel (1) failed to object to, or seek suppression of, defendant's confession on the ground it was preceded by an inadequate warning pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); and (2) failed to object, on confrontation clause grounds, to Somavia recounting C.G.'s identification of defendant. The Attorney General originally conceded deficient performance in each instance, but subsequently withdrew the concession as to, and the parties filed supplemental briefing on, the *Miranda* issue. We conclude reversal is required.

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.) This standard of prejudice applies even where the claim of error, if raised directly and not by means of an ineffectiveness claim, would have been evaluated under a more stringent standard. (See *Weaver v. Massachusetts* (2017) 582 U.S. ___, ___ [137 S.Ct. 1899, 1910-1911]; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008-1009.)

"A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1003.) "If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 367.)

Miranda

"[W]hen an individual is taken into custody . . . and is subjected to questioning, . . . the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . . [U]nless and until such warnings and waiver [of rights] are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (*Miranda*, *supra*, 384 U.S. at pp. 478-479, fn. omitted.) Although there is no "precise formulation" in which the warnings must be given, they must " 'reasonably "conve[y] to [a suspect] his rights as required by *Miranda*." ' [Citations.]" (*Florida v. Powell* (2010) 559 U.S. 50, 60.)

In the present case, Pena advised defendant: "[Y]ou have the right to remain silent. You understand that? [¶] . . . [¶] . . . Anything you say can be used against you in a court of law. Do you understand that? [¶] . . . [¶] . . . You have the right to have attorney present before and during any questioning, if you wish. Do you understand that? [¶] . . . [¶] . . . Any time you can exercise your rights, you don't have to answer any questions or make any statements. Do you understand that? So you understand your rights, right?"

Absent from the foregoing was the requisite advisement that if defendant could not afford an attorney, one would be appointed for him prior to questioning, if he so desired.

Defense counsel neither sought suppression, nor raised any objection to admission, of defendant's statement, during the course of which defendant confessed to the charges. Such a motion or objection would have been meritorious (see *People v. Torres* (2018) 25 Cal.App.5th 162, 171, 180) and, on this record, there simply could be no satisfactory explanation for the omission (cf. *People v. Kelly* (1992) 1 Cal.4th 495, 521-522). Accordingly, counsel's performance was constitutionally deficient.[3]

The Attorney General disputes our conclusion. He argues defense counsel might have had information that led him to believe an objection on *Miranda* grounds would be futile. The record on appeal does not support such speculation. (Cf. *People v. King* (2010) 183 Cal.App.4th 1281, 1310.) Nor does the record support the notion counsel could have had a *reasonable* tactical purpose for forgoing a challenge to the confession in that counsel may have believed the confession would be more helpful than harmful to defendant.

Confrontation

The confrontation clause of the Sixth Amendment to the United States Constitution prohibits "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54 (*Crawford*).) Statements are "testimonial" when " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' " (*Id*. at p. 52.) "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness,

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[3] We make this finding with respect to retained trial counsel only, and not as to Deputy Public Defender Andrew Stark, who represented defendant until January 21, 2016. Trial did not begin until slightly more than one year after the public defender's office was relieved, and Stark had no reason to challenge admission of the confession at the stages of the proceeding at which he represented defendant.

Crawford teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . , or for some primary purpose other than preserving facts for use at trial. . . . [T]estimonial statements do not become less so simply because an officer summarizes a verbatim statement . . . . As the [United States Supreme Court] observed: '[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant . . . .' " (*People v. Sanchez* (2016) 63 Cal.4th 665, 694-695.)

In the present case, C.G. did not testify at the preliminary hearing. At trial, outside the jury's presence, the prosecutor announced she was going to call Somavia as a witness to testify to C.G.'s identification of defendant. The court asked if C.G. was present; the prosecutor said no, he had moved out of state. When the prosecutor asked Somavia, in open court, whether C.G. was able to identify anyone at the in-field show-up, defense counsel's hearsay objection was overruled.[4] Somavia then testified C.G. identified defendant.

Defense counsel raised no confrontation clause objection to Somavia's recitation of C.G.'s extrajudicial identification of defendant. Counsel may have had information that C.G. was indeed legally unavailable. If so, counsel may have made a reasonable tactical decision to forgo requiring the prosecutor to establish that fact. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1185.) The same cannot be said with regard to the absence of a prior opportunity to cross-examine C.G., however. We have no doubt C.G.'s identification of defendant, coming, as it did, almost three months after the robbery, was "testimonial" within the meaning of *Crawford*. The fact defense counsel objected on hearsay grounds refutes any inference he had a tactical purpose for failing to raise what

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4 We note that the hearsay objection was appropriate and should have been sustained independently of the *Crawford* issue.

would have been a meritorious confrontation clause objection (see *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366), nor could there be a satisfactory explanation, on this record, for the omission. Accordingly, counsel's performance was constitutionally deficient.

Prejudice

The Attorney General argues defendant has failed to establish there is a reasonable probability the outcome of his trial would have been different absent counsel's errors. The Attorney General reasons that leaving aside defendant's confession and C.G.'s identification, the evidence of defendant's guilt was still strong, since M.D. identified defendant in court and in a photographic lineup as the robber. We disagree. Certainly, M.D.'s testimony furnishes sufficient evidence to sustain the convictions. Nevertheless, our confidence in the outcome has been undermined by counsel's failings.

First, M.D.'s identification was not unassailable. Unlike C.G., who apparently had seen defendant on several prior occasions, M.D. had not seen him before the robbery. There was some suggestion, from what Pena told defendant, that M.D. could not "see that great" and did not identify defendant "out in the field," although he made an identification when shown defendant's photograph.

More importantly, the record shows that during deliberations, the jury asked to view the video recording of defendant's statement "from the point of his actual confessing of the actions to the end of the video." The request from the jury was received at 3:37 p.m. The video was played and, 20 minutes later, the jury returned its verdicts. This strongly suggests defendant's confession likely resolved any doubts jurors had regarding defendant's guilt. (See *People v. Torres*, *supra*, 25 Cal.App.5th at p. 182.) As the United States Supreme Court has recognized, "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . .' [Citations.]" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296.)

Had defendant's confession and C.G.'s extrajudicial identification been removed from the jury's consideration, there is a reasonable probability defendant would have obtained a more favorable verdict on both counts. As defense counsel's performance was constitutionally deficient and defendant has adequately demonstrated he was prejudiced as a result, defendant is entitled to reversal.[5]

DISPOSITION

The judgment is reversed. In the event of further proceedings in the trial court, that court is directed to confirm the spelling of defendant's surname with defendant and to correct its records, including any transmitted to the California Department of Corrections and Rehabilitation, accordingly.

[5] Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), we are required to report our reversal of the judgment for ineffective assistance of counsel to the State Bar of California for investigation of the appropriateness of initiating disciplinary action against trial counsel. We shall do so upon issuance of the remittitur in this case.